

EPA and State Progress in Issuing Title V Permits

OIG Recommendations and Action Plan

Prepared by EPA's Office of Air & Radiation

NOTE: Office of Air and Radiation (OAR) will hold reporting of progress meetings in March and September annually with the Office of the Inspector General (OIG) on its progress in completing the Action Plan as described below.

Recommendation 3-1: Require EPA regions, through the memorandum of understanding, to expeditiously conduct fee protocol reviews. Regions should prioritize fee reviews to initially focus on State and local agencies that have not completed their initial Title V permits. Regions should ensure that State and local agencies take action to address the findings of the fee protocol reviews.

Action Plan: Region VIII and Headquarters prepared the fee protocol in 1997 after extensive coordination with the other Regional Offices. It was designed to identify existing practices by States in the collection, management and dispersal of fees collected under the auspices of title V operating permits. On January 26, 1998, a request was sent from Tom Curran, acting division director, to the Regional Air Division Directors. The Regions were encouraged to consider using the protocol in at least two permitting authorities each year, and established a goal of completing fee reviews in all permitting authorities within a few years. Each year, a commitment to do 1 or 2 fee reviews is written into OAR's annual operating guidance. Approximately 46 fee reviews have been completed (out of 116), including 4 in Region I, 3 in Region II, 3 in Region III, 18 in Region IV (using a simplified version of the protocol), 5 in Region V (using a simplified version of the protocol), 1 or 2 in Region VI, 1 in Region VII, 6 in Region VIII, and 3 or 4 in Region X. Among the findings to date: In some States, such as New Hampshire, Virgin Islands, South Dakota, Montana and Oregon, the Regions found no problems. In other States, such as Rhode Island, Massachusetts, and New Jersey, the fees charged

were much less than the costs of implementing the program. In others (e.g., District of Columbia, 8 agencies in Region IV), title V fees were not being carefully tracked from an accounting perspective. In other cases, such as Maryland and Idaho, title V monies were being used for non-title V expenses. Regions were to follow up where problems were uncovered.

Pursuant to this report and the future direction of Office of Air Quality Planning and Standards (OAQPS), we will revise EPA's role in overseeing the implementation of the title V programs in States. Our regulations authorize us to evaluate these State programs for compliance with the requirements of part 70. Comprehensive evaluations covering each of the main components of a title V program (e.g., fees and appropriate levels of funding; permit content) will be conducted and designed to be carried out on a cyclical basis over the long term. Initially the evaluations will consist of the same series of preset questions intended to cover the main components of the program. To the extent that a Regional office is already familiar with a given component of the State's program and can provide supporting data, that component need not be covered in the on-site State evaluation. However, in the absence of specific information, the evaluation will cover all components of the program. Regions would be expected to follow up with the States as necessary after completing the evaluations.

Target completion date: Over this summer we will work with the Regions to develop the evaluation protocol. We will have this completed by the end of FY 2002 and begin the evaluations in FY 2003. Our goal will be to audit 25 percent of the programs nationally per year. A complete first round of the audits will be completed by the end of FY 2006.

Recommendation 4-1: Develop a plan for identifying, collecting, and disseminating good practices on the implementation of Title V programs. Reviews of State and local programs, recommended in Chapter 3, would be one source of information on good practices.

Action Plan: In connection with the above mentioned evaluations, we will highlight the good practices used by State permitting authorities as identified in the OIG findings as well as others we uncover. We will ask the Regions to pass this information on to their States and locals as they conduct their program evaluations. In addition, we will work with State and Territorial Air Pollution Program Administrators

(STAPPA) Association of Local Air Pollution Control Officials (ALAPCO) and Environmental Council of the States (ECOS) to share what we learn.

Target completion date: Part of overall evaluation effort.

Recommendation 3-2: Revive agency efforts to make air toxics standards easier to incorporate into Title V permits.

Action Plan: The issue of writing “permit friendly” air toxics emission standards was identified in 1996 for attention. In response to this, an internal workshop was held in 1997 for the Maximum Achievable Control Technology (MACT) standards writers with a focus on requirements of part 70 and how the MACT standards could be better written to take into consideration their implementation through the operating permits program. A notebook with guidelines for the standards writers was a product of this effort. Thus, MACT standards developed since 1997 have been designed to be readily translated into permit terms and conditions. We will confirm with the standards writers in OAQPS that the notebook guidelines have been useful and that they are still complying with the guidelines. If adjustments are needed to the guidelines, they will be done.

In addition to the workshop, the Program Implementation Review Group in OAQPS has a mandate to work with STAPPA and develop implementation tools for certain MACT standards. The website <http://www.epa.gov/ttn/atw/eparules.html> is devoted to information about many of the MACT standards and associated implementation tools. Selecting the hypertext link for any of about 40 rules in this section of the website results in access to information explaining individual rules and includes implementation details designed specifically for State permit writers such as self-paced interactive training, fact sheets, and even some State-developed training materials. Notwithstanding the above efforts, we will look into why it is that some permitting authorities still contend that MACTs are not permit friendly. We will do this through the aforementioned evaluations.

According to your report, “[i]n each of the six agencies reviewed, at least one Title V operating permit was delayed because the staff had difficulty determining the portions of the air toxics regulations to be included in a source’s permit.” Also, you stated that “[a] Wisconsin ... permit engineer had difficulty understanding how to incorporate air toxics regulations in the permit.” Such evidence is not

necessarily suggestive of a pervasive problem. A possible explanation for your findings is that certain MACT standards contain more than one means of achieving compliance in the form of Alternative Operating Scenarios which are provided so that sources have flexibility in their operations without the need to constantly revise the permits. This flexibility by its nature complicates permit writing and enforcement. A balance between permit flexibility and permit simplicity is often necessary, and permits are not always amenable to “ease of incorporation.” Given this, we feel we have done a good job in striking this balance. However, as noted before, we will include incorporation of air toxics requirements in permits as a component of our evaluation. In addition, we will work with STAPPA/ALAPCO to see if there are specific steps we could take to improve this process.

Target completion date: Part of overall evaluation effort.

Recommendation 3-3: Complete the revisions to the Title V regulations.

Action Plan: EPA created the rules that set out the minimum standards for State title V operating permit programs on July 21, 1992 at part 70 of 40 CFR. The current rules include in part provisions that describe who must apply for a permit, procedures for issuing and revising permits, the content of a title V permit, and the roles of the permitting authority, EPA, and the public. One of the most controversial issues in developing the 1992 rule was the procedures that States must use when they revise permits to reflect proposed changes at a facility. The title V permit is expected to include the current requirements that apply to a facility. Thus, when a facility proposes to change the way it operates, the title V permit must often be revised. Environmental groups challenged the 1992 rule in court on grounds that it does not require any public review for a broad class of changes at permitted facilities. Industry groups opposed this challenge on grounds that the added public oversight would cause excessive delay to facilities seeking to change their operations. The current rules were also challenged on a number of other issues by a variety of industry groups, environmental organizations, and States; however, a primary theme was the dissatisfaction with the permit revision procedures. The litigation on the current operating permit rules is stayed in court, pending the results of the final rulemaking to revise part 70.

In response to litigation on the 1992 rule, EPA proposed amendments to part 70 and 40 CFR part 51 (the rules for preconstruction permits) on August 29, 1994 and August 31, 1995. The major issue addressed in these proposals was the permit revision procedures. After considering comments on those proposed rules, we released a draft final rule in May, 1997. After receiving mostly adverse oral comments on the draft final rule, we opened extensive discussions with representatives of industry, States and environmental organizations. The issues raised by stakeholders in these discussions are addressed in yet another proposal currently under review in the Agency. That proposal also addresses problems we have identified with how permitting authorities are implementing the program under the current rules. The current schedule for publishing this proposal is unclear, since it depends on the results of EPA's internal review.

As noted in our recommendation on this draft report, OAR does not agree with this recommendation. OAR does recognize that permitting authorities would welcome the completion of our current rulemaking on part 70, but we believe that States may have overstated the extent to which this has impacted issuance of the initial permits. We also view changes to part 70 at this late date as a possible impediment to permit issuance as it might force some States to alter their current permit revision procedures, and thereby actually slow permit issuance. The changes to part 70 focus primarily on the revision of permits rather than on their initial issuance. Seventy percent of the title V permits have been issued. OAR does not believe these proposed changes are critical to the original round of permits. By the end of this fiscal year, we will have a plan for any part 70 changes.

Target completion date: By the end of FY 2002, we will share with the OIG a plan for any part 70 changes.

Recommendation 3-4: Identify and collect information from regions, States, and local agencies sufficient to: (a) measure the progress of State and local agencies and determine where they are having problems issuing permits, (b) ensure program consistency, and (c) respond to reasonable requests for information regarding implementation of the Title V program.

Action Plan: On March 17, 1994, a memorandum on Permit Program Data Elements (PPDE's) was

sent from OAQPS to the Regional Air Division Directors. The memo laid out the data elements that were to be required on a national basis for all permits “in order to oversee and respond to inquiries concerning the implementation of title V...” To be included was information on source identification, date that EPA received proposed permit, date that EPA’s 45-day review period ends, and date permit was issued. For certain situations, additional information would be required, including: date of EPA objection, date of public petitions to EPA, and date of EPA action on a proposed permit. The memo indicated that such information was needed in order to (1) oversee the title V and part 70 requirements, (2) ensure program consistency, and (3) respond to reasonable requests for information concerning implementation of the program.

An enhanced version of the Aerometric Information Retrieval System (AIRS), the AIRS Facility Subsystem (AFS) was intended to be the database into which this information would be entered. States would be required to make use of AFS for tracking title V permits. The States had the principal responsibility for supplying the data, with some information coming from EPA’s Regional offices. It was to be the Regions’ job to assure that States incorporated the data entry function into their State-EPA permit program implementation agreements. Should the States not provide the PPDE’s to AIRS on all permits, then the Regions were expected to do so. Lack of having the information on all permits “will result in the inability of the Regions and Headquarters to manage the program and to respond to questions...” The annual OAR Program Guidance has been the vehicle to require this reporting to occur.

Subsequent to the preparation of the memorandum on PPDE’s, and as a result of the experience gained with additional years of program implementation, we developed alternative means of collecting and interpreting information germane to permit issuance. Nonetheless, we have, and intend to continue including the PPDE’s as a part of the annual OAR Program Guidance prepared for the Regional Offices. We are told through the midyear reports submitted by the Regions that the States are fulfilling their PPDE reporting responsibilities into AIRS. These midyear reports are pursuant to the annual Memorandum of Understanding between Headquarters and each Region. As necessary, changes will be made to that annual requirement to gain additional insights into measures of progress in permit issuance. The data elements which we routinely collect have proven over time to be sufficient to manage permit issuance and to answer questions from EPA management and the public concerning the

status of State permitting programs. These data are publicly accessible on our website and are updated quarterly.

It is important for EPA to be reasonable in the amount and types of data that it requests from permitting authorities, since the provision of data comes at the expense of other title V obligations, such as the drafting and issuance of permits. We feel the States have given us sufficient information in the past on permit issuance and impediments to program implementation. Furthermore, we believe we are receiving adequate detailed data to understand permit issuance. In order to get a handle on program consistency, the program evaluations described above will be beneficial. Finally, we have been focusing on ensuring consistency over time as is evidenced by the posting on our website of all citizen petitions to the agency and also our call in 2000 for the public to comment on program implementation deficiencies. In response, we received 28 State/local specific comment letters, we issued Notices of Deficiency (NOD) to 8 States and required letters of commitment from 24 State/locals where inconsistencies were identified. Subsequent to petitions we received from environmental and citizen groups and our actions responding to these comment letters, an NOD was also issued to California. *Target completion date:* Ongoing. The PPDE reporting will be examined during the program evaluations.

Recommendation 3-5: Develop and implement protocols for reviewing other aspects of the Title V program, including assessing the level of State and local management support and priority given to Title V activities. (See chapter 4 for examples of good practices in these areas.)

Action Plan: See response to recommendation 3-1.

Recommendation 3-6: Develop and execute a national plan for addressing deficiencies in Title V programs, specifically the action EPA will take to address missed milestone dates for issuing the initial permits. The plan should specify how EPA will use the provisions of the Act

to address continuing Title V program implementation issues, including: (a) notices of deficiency that may trigger sanctions and program withdrawal, and (b) fee demonstrations.

Action Plan: EPA has a national plan in place for addressing deficiencies in title V programs, triggered by the OIG report and our November 2000 settlement agreement with the Sierra Club. The three components of our plan include (1) tracking the performance of permitting authorities which have made commitment letters to correct program deficiencies (including permit issuance deficiencies), or have been issued NOD's, (2) begin evaluations of all permit programs to assess their performance, and (3) requiring, where appropriate, letters of commitment from permitting authorities for program implementation deficiencies and NOD's for significant legislative and/or regulatory deficiencies.

The Agency decided that the most efficient way to deal with permit issuance was to require State agencies to submit issuance schedules with trackable milestones for those States that received such citizen comments. These schedules were submitted with the understanding that EPA could issue NOD if the milestones were missed. It is EPA's plan for the Regional Offices to proactively manage those schedules, including tracking interim milestones, and identifying reasons why milestones are missed. Based on those schedules, it is our intention to issue NOD's for missed milestones and schedules. We will include in the FY 2003 annual air program guidance a requirement that the Regional Offices manage and report progress against these schedules.

Where the deficiencies are related to program implementation shortcomings, such as permit content, the Regional Offices are monitoring the State commitment letters and reviewing recently issued permits to ensure that the permits contain the proper language. The EPA will monitor State performance and fully intends to issue NOD's where States are not meeting their commitments. Where the deficiencies relate to regulatory language, the Regions are tracking State progress in revising their regulations. The issuance of NOD's at the end of 2001 and early in 2002 for deficiencies in 8 States started title V sanctions clocks for those permitting authorities.

For the permitting authorities that did not receive citizen comments, we are promoting permit issuance on a similar schedule. For agencies unable to commit to meeting that schedule, we will elevate them into the first group of agencies reviewed in our program evaluations. If we identify problems in these evaluations, either implementation issues or other types of issues, then we would use NOD's or

take other actions to get the problems fixed. We are confident that working proactively with permitting authorities will prove successful in achieving the desired corrections by States absent the need for more NOD's and commitment letters.

Target completion date: For item 1, the schedule for completion is reflected in the individual commitment letters. For the NOD's the schedule is laid out in our part 70 regulations. For item 2, a first round of permit program reviews will be completed by FY 2006. For item 3, the schedule will be determined when a commitment letter is received or a NOD is issued.